United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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UNITED STATES COURT OF APPEALS

For The District of Columbia

Docket No. 23,696 September Term, 1969

United States of America :
:
v. : Criminal No. 551-69
:
Warren A. Urquhart, :
:
Appellant :

Appeal from the United States District Court
For the District of Columbia

BRIEF FOR APPELLANT

James T. Barbour
Attorney appointed to represent
Appellant in this Cause

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STATUTES INVOLVED

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U. S. Code, Title 18, Section 371. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

D. C. Code, Title 22, Section 2201. Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

STATEMENT OF QUESTIONS PRESENTED

1. Did the trial Court commit reversible error in permitting the introduction of finger print evidence to prove either conspiracy or petit larceny?

2. Did the trial Court commit reversible error in permitting the prosecution to use a copy of the transcript of the testimony before the Grand Jury to refresh the recollection of a witness when in fact such use amounted to impeaching the witness?

3. Did the trial Court commit reversible error in permitting the introduction into evidence of a copy of an alleged lease that was not properly identified?

This case has not previously been before this Court.

JURISDICTIONAL STATEMENT

Case No. 23,696 is a direct appeal under Title 28 U.S. Code 1291 without prepayment of costs. James T. Barbour, a member of the bar of this Court, was appointed as Counsel to represent the appellant, Warren A. Urquhart.

Appeal is taken from the judgment, sentence and commitment in District Court, Criminal No. 551-69, wherein appellant, Warren A. Urquhart was sentenced on October 21, 1969 to one (1) year on each

count of the indictment charging conspiracy and six counts of petit larceny under U.S. Code Title 18, Section 371 and D.C. Code Title 22, Section 2201, said sentences to run concurrently.

REFERENCE TO RULINGS

None.

STATEMENT OF THE CASE

The Appellant, Warren A. Urquhart, together with Robert V. Joy and Edward O. Jenkins, were indicted on one count of conspiracy and nineteen counts of grand larceny, unauthorized use of a vehicle and receiving stolen property. Alfonso Turner, Carl Henderson and Samuel Brown were named as co-conspirators but were not charged as co-defendants in this action.

As a result of pre-trial conferences two of the grand larceny counts were eliminated and the remaining counts of grand larceny were reduced to petit larceny. Prior to commencement of the trial the number of counts was further reduced to eleven and following the close of the evidence more counts were dropped and the case went to the jury on one count of conspiracy and six counts of petit larceny.

The first witness called by the Government was Detective Young, who testified (T-16) that he was on routine patrol in an alley in the rear of 631-633 10th Street, N.E., in the early morning hours

of June 20, 1968, when he saw a 1965 Pontiac convertible parked, and upon examination he observed that the transmission was missing. He also saw that tracks behind the vehicle led to the garage at 631 10th Street, N.E. (rear). He then saw a 1963 Chevrolet parked in front of the garage in the rear of 633 10th Street, N.E., and there were two people in the car who appeared to be sleeping. One of the occupants identified himself as the appellant, Warren A. Urquhart. The other was one Jackson. Thereafter the officer directed a flashlight through a hole in the garage door at 633 and was able to see a Chevelle automobile, some tools on the floor, engine parts, etc. He then radioed for a uniform car (T-21) to keep the premises under surveillance until he could obtain a search warrant. This was done about 10:00 A.M., and he and another officer entered the garage where he found a chain hoist and various parts of automobiles. All the articles were seized, including the Pontiac. The Pontiac was taken to the impounding lot and the other articles were taken to the police property office where they were inventoried.

The government then called various witnesses who identified the seized property as parts of automobiles they owned or of which they had lawful custody.

Robert H. Pucket was called and testified (T-140) that he was a member of the fingerprint division of the Metropolitan Police Department, and that he had identified a print taken from an abandoned

automobile at 100 12th Street, N.E., as that of the left middle finger of Warren Allen Urquhart, the appellant.

One Gregory Daniels then testified (T-185) that he, with Wesley Terry, went in a truck to the garage in the rear of 633 10th Street, N.E., and bought an engine and transmission. The appellant was in the garage at the time and Daniels paid him $300. Much of the testimony of this witness was contradictory and at times unintelligible.

Samuel Edward Brown then was called as a witness for the prosecution (T-219). He had testified before the Grand Jury and waived his rights under the Fifth Amendment. He at first stated that he did not wish to testify, but after conferring with counsel appointed for him by the Court, and upon being promised immunity from prosecution, consented to testify. He said that he, Alonzo Turner and Carl Henderson had talked about renting a garage to work on his own car. He borrowed $25.00 from Warren Urquhart and an additional $25.00 was supplied by Turner. With the $50.00 he and Joy went to a hardware store at 1502 14th Street, N.W., where he paid the money and signed Carl Henderson's name to a lease and obtained the keys to the garage in the rear of 631 and 633 10th Street, N.E. He then testified as to the various automobiles that were in the garage from time to time, but said that he worked only on his own car. It was apparent to the prosecutor that the testimony given by this witness was inconsistent with that given to the Grand Jury and he said that he would announce surprise. He then

changed his position, and with the permission of the Court and over the objection of the appellant, used the transcript of the Grand Jury testimony to "refresh the recollection" of the witness, when the witness had, in fact, given unequivocal answers to questions which were at variance with his prior answers. Finally, after much prodding, he placed the appellant at the scene of the garage.

Emanuel Dickey was then called to testify and said that he was employed at the hardware store and that Brown and Urquhart had come to the store to rent the garage; that he was present when Brown signed Henderson's name to the lease, but he could not explain how the name of Robert V. Joy also appeared on the lease.

One Johnson was then called by the government and (T-387) again over the objection of the appellant, the prosecution was permitted to "refresh" the recollection of the witness with respect to who was present in the garage, when the answers of the witness were unequivocal.

No evidence was offered on behalf of the appellant and at the close of the government's case the exhibits were offered in evidence. Appellant objected to the admission of the finger prints and the lease, but the objection was overruled.

Motions were made on behalf of all the defendants to dismiss the indictment and the Court granted the motion as to defendant Jenkins and denied the motions as to the appellant and Joy.

Thereafter the indictment was rewritten and the case sent to the jury on one count of conspiracy and six counts of petit larceny.

The jury returned a verdict of guilty on all counts as to the appellant Urquhart and the defendant Joy.

STATEMENT OF POINTS

I. The Trial Court erred in admitting evidence of fingerprints taken from a motor vehicle as evidence of either conspiracy or larceny.

II. The Trial Court erred in permitting the prosecution to use a copy of the transcript of the testimony given before the Grand Jury to refresh the recollection of witnesses when the witnesses did not say that their recollections needed refreshing.

III. The Trial Court erred in admitting into evidence a copy of a lease that had not been properly identified.

SUMMARY OF ARGUMENT

I. The Government produced as a witness one Robert H. Pucket, a fingerprint expert (T-140) to identify a certain fingerprint alleged to have been lifted from the front left window of a Chevrolet automobile which was found parked in front of 100 12th Street, N.E. This testimony was objected to on the ground that such evidence was not competent to prove either conspiracy or larceny, and cited to the

Court was the case of Cephas v. United States, 117 U.S. App. D.C. 15. At the time that this evidence was elicited no conspiracy had been proved. Upon the promise of the District Attorney that he would later show a connection between the defendants and this evidence, the Court permitted the testimony. It is submitted that no further testimony was put in, but the prosecutor offered in evidence as one of the exhibits, the fingerprint so identified. Timely objection was made at this time and overruled. This evidence had no probative value as to either conspiracy or larceny and the admission of such evidence was prejudicial to the appellant.

II. The witness Samuel Brown was named in the indictment as a co-conspirator but he was not charged as a co-defendant, apparently because he had pleaded guilty to grand larceny and receiving stolen goods (T-327). He was called as a witness by the Government and under direct examination by the prosecutor gave answers different than those he gave under oath before the Grand Jury. After a lengthy examination, the prosecutor, at a bench conference, announced that he was going to claim surprise as to this witness and that he would proceed to impeach him (T-261).

After the luncheon recess, however, he said that he would withdraw his claim of surprise and use the transcript of the Grand Jury testimony to refresh the recollection of the witness and the

Court allowed this procedure over the objection of defense counsel. He then proceeded to elicit the same answers that had been given before the Grand Jury, even though the witness did not say that his recollection needed refreshing as to the facts (T-273). It is respectfully submitted that this procedure was tantamount to impeachment without conveying to the jury the import of what was happening, and therefore was highly prejudicial to the appellant.

Again, with respect to witness Johnson, the same procedure was allowed over the objection of defense counsel (T-386). This witness had also been asked questions that had been asked before the Grand Jury, and though his answers may have been different, they were unequivocal. For instance, at T-385, the following occurred:

> Q. Do you recall whether you went by yourself or with someone else down to that garage?
>
> A. I went by myself.
>
> Q. No one else accompanied you down to the garage?
>
> Mr. Barbour: If the Court please, the witness has already answered that.
>
> Mr. Rudy: I would like to approach the bench, Your Honor.
>
> (BENCH CONFERENCE)
>
> Mr. Rudy: Your Honor, I am going to claim surprise on this witness as to this particular question.

His Grand Jury Testimony was:

Question: Who took you down there?

Answer: Alfonso Turner.

Question: He took you down to the garage in the rear of 631-633 10th Street and told you he had a transmission for you?

Answer: Yes, sir.

Which is completely contrary to what he has stated.

THE COURT: You may show him the answer and perhaps it will refresh his recollection. If it doesn't, you may claim surprise.

While the answer ultimately elicited from the witness did not apply to the appellant, subsequent answers did, and it is submitted that the correct procedure to have been followed was to impeach the witness or ask him no more questions, since it was obvious that he was not telling the truth on one occasion or the other and the jury was entitled to know that.

III. Government's exhibit No. 62 was improperly admitted into evidence. This document purported to be the lease between S & L Properties, Inc., and Carl Henderson, although Samuel Brown had testified that he signed the name of Carl Henderson. Mr. Blumberg testified (T-494) that he was the owner of the real estate involved at

the time the lease was signed, but no explanation was offered as to why the lease was in a corporate name and the document was not signed at all by the lessor.

CONCLUSION

Appellant respectfully submits that the Court should reverse the judgment of the Court below and enter appropriate relief.

Respectfully submitted,

James T. Barbour
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Appellant in this case

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Brief for Appellant upon John F. Rudy, II, Esquire, Assistant United States Attorney, by delivering a copy thereof to the office of the United States Attorney, United States Courthouse, Constitution Avenue and John Marshall Place, N.W., Washington, D. C., this 13th day of March, 1970.

James T. Barbour